



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 14 September 2016

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON AYYASH DEFENCE MOTION FOR 'REISSUANCE' AND ONEISSI
DEFENCE MOTION FOR RECONSIDERATION OF THE TRIAL CHAMBER'S
DECISION OF 29 JULY 2016**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Hugh Milne

Counsel for Mr Salim Jamil Ayyash:

Mr Emile Aoun, Mr Thomas Hannis & Mr Chad Mair

Head of Defence Office:

Mr François Roux

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothee Le Fraper du Hellen & Mr Jad Khalil

**Legal Representatives of
Participating Victims:**

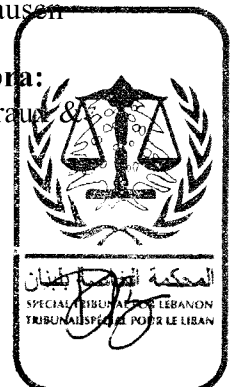
Mr Peter Haynes, Mr Mohammad F. Mattar & Ms Nada Abdelsater-Abusamra

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraud & Mr Geoffrey Roberts



BACKGROUND

1. The amended consolidated indictment pleads, at paragraph 49, that the four Accused, as was the former Accused, Mr Mustafa Amine Badreddine, ‘supporters of Hezbollah’.¹ The Prosecution must lead evidence at trial of this pleaded material fact. On 29 July 2016, the Trial Chamber, on the Prosecution’s application, found a statement of a Prosecution investigator, Mr Timothy Holford (Witness PRH400) and its annexes admissible evidence under Rules 154 and 155 of the Special Tribunal’s Rules of Procedure and Evidence, without requiring him to attend court for cross-examination, holding that it would formally admit the documents into evidence in court.²

2. The Trial Chamber found the statement and the annexed documents were relevant and *prima facie* reliable probative evidence of the Prosecution’s pleading that the four Accused and Mr Badreddine—as an alleged co-conspirator—are alleged Hezbollah supporters.³ The Trial Chamber also noted that it had received evidence that ‘Mr Badreddine was a senior Hezbollah military commander in Syria’, in particular in a speech of the Hezbollah Secretary-General, Mr Hassan Nasrallah, praising Mr Badreddine, and in a Hezbollah media release extolling Mr Badreddine as a martyr for Hezbollah.⁴ That evidence was tendered in hearings on 31 May and 1 June 2016 relating to Mr Badreddine’s death.⁵

SUBMISSIONS

Defence submissions

3. Counsel for Mr Salim Jamil Ayyash—joined by counsel for Mr Hassan Habib Merhi and Mr Assad Hassan Sabra—request the ‘reissuance’ of the Trial Chamber’s decision to remove the reference to the exhibits related to Mr Badreddine’s death. They argue that the Trial Chamber relied on material not in evidence in the *Ayyash* case. Counsel also move for

¹ The same pleading appears in paragraph 49 of the consolidated indictment of 7 March 2014, that the then five Accused are all “supporters of Hezbollah, which is a political and military organisation in Lebanon”.

² STL, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, F2675, Decision on the Admission of the Statement of Mr Timothy Holford (Witness PRH400) and Annexed Documents, 29 July 2016.

³ Decision, paras 6-7.

⁴ Decision, para. 7, referring to exhibits P862MB, P862.1MB and P834MB.

⁵ Transcript of 31 May 2016, pp 14-15, 19-20, 31, 54, and 1 June 2016, pp 10-11. *See also* F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016, para. 4.

an order that proper procedural mechanisms are followed if the Prosecution wishes to tender any of this material into evidence.⁶

4. Counsel for Mr Oneissi join the Ayyash Defence motion, but additionally request the Trial Chamber to reconsider its decision and declare Mr Holford's statement and the annexed documents inadmissible. Counsel argue that the Trial Chamber made findings that exceeded the scope of the Prosecution's motion regarding Mr Badreddine's role in the consolidated indictment, following his death and Hezbollah's alleged association with the conspirators in the *Ayyash* case. Counsel also take issue with the Trial Chamber's decision that Mr Holford's cross-examination is unnecessary. Further, the Trial Chamber's determinations constitute an abuse of authority and cause prejudice and procedural injustice, justifying the request for reconsideration, under Rule 140.⁷

Head of Defence Office's observations

5. The Head of Defence Office filed observations endorsing these filings, emphasising the violation of Mr Badreddine's presumption of innocence 'if [...] the Trial Chamber continues [...] to admit evidence relating exclusively to the alleged guilt of the deceased or to his alleged role in the conspiracy'.⁸

Prosecution's response

6. In its consolidated response, the Prosecution requests the Trial Chamber to dismiss the Ayyash Defence motion because 'reissuance' is not a remedy, and Defence counsel did not seek a reconsideration of the decision—the appropriate legal remedy under the Rules. There is no prejudice to the Defence in the Trial Chamber noting that it had received evidence related to Mr Badreddine's alleged role in Hezbollah.

⁶ F2687, Ayyash Defence Motion for Reissuance of a Trial Chamber Decision and Request for an Order, 12 August 2016, paras 2-3, 7, 11-12, 14-18; F2691, Adjonction de la Défense de Merhi à la "Ayyash Defence Motion for the Reissuance of a Trial Chamber Decision and Request for an Order", 15 August 2016; F2688, Sabra Joinder to "Ayyash Defence Motion for the Reissuance of a Trial Chamber Decision and Request for an Order", 12 August 2016.

⁷ F2697, Oneissi Request for Reconsideration of the Trial Chamber Decision dated 29 July 2016, 19 August 2016, paras 2-4, 8-13, 15.

⁸ F2702, Observations du Chef du Bureau de la Défense concernant la décision de la Chambre de première instance du 29 juillet 2016, 25 August 2016, paras 13-15.

7. Further, it will seek admission of certain exhibits related to Mr Badreddine's death,⁹ rendering the Ayyash Defence submissions moot. Moreover, the Oneissi Defence failed to meet the requirements for reconsideration and demonstrate an error of law, abuse of discretion or existence of new facts or material change in circumstances that resulted in injustice, required by Rule 140. Defence counsel did not address the lack of relevance of Mr Holford's evidence. The motion should be dismissed.

8. The Head of the Defence Office did not provide the required advance notice to the Trial Chamber of his intention to file observations, contrary to the relevant Practice Direction.¹⁰ The Statute, the Rules and the Practice Direction do not grant the Defence Office standing to file observations regarding the interests of a deceased person who is not an accused or suspect. The reasons provided for his intervening are insufficient to enable the Head of Defence Office to exercise his conditional right of audience. Four Defence teams, appointed by him, filed submissions to the Trial Chamber in the matter, and he adds nothing new to the litigation.¹¹

Defence reply

9. Counsel for Mr Ayyash replied, reiterating that the Trial Chamber has discretion to vary, correct, or clarify its own decisions in the interest of justice without having been moved to do so by a request for reconsideration in order to remedy the appearance of prejudice and a breach of the Rules.¹²

DISCUSSION

10. A Chamber may, under Rule 140, '*proprio motu* or at the request of a Party, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice'. The Appeals Chamber emphasised that reconsideration is exceptional and that there must be an

⁹ F2711, Prosecution Consolidated Response to: (i) Ayyash Defence Motion for Reissuance and an Order, (ii) Oneissi Defence Request for Reconsideration, and (iii) Defence Office Observations, 5 September 2016, paras 2, 10.

¹⁰ STL/PD/2011/04, Practice Direction on the Role of the Head of Defence Office in Proceedings Before the Tribunal, 30 March 2011, para. 8 states that if 'the Head of Defence Office considers that the interests of justice require his intervention orally or in writing *proprio motu*, pursuant to Rule 57(F), he shall inform the Pre-Trial Judge or Chamber in advance whenever possible. The Pre-Trial Judge or Chamber shall hear the other parties to the proceedings on the issue of whether the intervention is in the interests of justice only if the exceptional circumstances of the Case so require'.

¹¹ Prosecution response, paras 2-4, 6-7, 10, 13-20, 23-26.

¹² F2718, Ayyash Defence Reply to Prosecution Response to Ayyash Motion for Reissuance of a Trial Chamber Decision and Request for an Order, 12 September 2016, paras 2-4.

actual injustice.¹³ This Rule may not be used as ‘an ordinary remedy’ to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’. The party seeking reconsideration must show an injustice that ‘involves prejudice’ and is ‘demonstrated on specific grounds’. If prejudice or ‘an injustice’ is shown, reconsideration may be granted on grounds that include an error of law, abuse of discretion, or the existence of new facts or a material change in circumstances.¹⁴

11. ‘Reissuance’ is not a legal remedy specified in the Special Tribunal’s Rules. Counsel for Mr Ayyash implicitly, and in reality, seek the reconsideration of the Trial Chamber’s decision to remove parts from its reasoning but leaving the actual decision unchanged. Contrary to their submissions, the Trial Chamber did not rely on the evidence related to Mr Badreddine’s death, but it merely noted its existence. This is no reason to reconsider, in the interests of justice, a decision declaring Mr Holford’s statement and annexes as admissible evidence.

12. The Trial Chamber also stresses that the Prosecution’s motion was unopposed by counsel for the four Accused. Moreover, Defence counsel did not file a response to the motion after the Trial Chamber’s order of 11 July 2016 terminating the proceedings, without prejudice, against Mr Badreddine, opposing the motion or seeking any orders.

13. Since the filing of the Defence motions, the Trial Chamber has ordered the Prosecution to file a summary statement of any evidence it wishes to lead in support of its pleading in the amended consolidated indictment that Mr Badreddine and the Accused are ‘supporters of Hezbollah’.¹⁵ The Prosecution’s intention to seek the admission of documents related to Mr Badreddine’s death potentially renders the Ayyash motion moot. But further, the Trial Chamber made no findings in its decision regarding Mr Badreddine or his role but simply referred to the operative indictment. This provides no basis to reconsider the admissibility of Mr Holford’s evidence. And counsel for Mr Oneissi did not demonstrate on specific grounds that leaving the decision standing would cause injustice involving prejudice. The request for reconsideration is unjustified and dismissed.

¹³ STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012, paras 22-23.

¹⁴ F2179, Reasons for Decision not to Reconsider the Trial Chamber’s ‘Decision on Prosecution Motion for Video-Conference Link Testimony for Witnesses PRH032, PRH067, PRH089, PRH090 and PRH553’ of 17 August 2015, para. 9.

¹⁵ F2713, Decision Amending the Consolidated Indictment, 7 September 2016, para. 58 and disposition.

14. In its decision amending the consolidated indictment, the Trial Chamber rejected similar Defence submissions in relation to both the presumption of innocence of someone not accused before the Special Tribunal, and found that it was permissible to call evidence on the role of an unindicted alleged co-conspirator. The Trial Chamber concluded that under the principles and practices of international criminal law the amended consolidated indictment correctly and permissibly pleads the name and alleged role of Mr Badreddine.¹⁶ This too renders the Defence request for reconsideration moot.

15. Additionally, the Oneissi Defence arguments regarding the cross-examination of Mr Holford are self-defeating. Counsel object to the Trial Chamber's finding as unnecessary, yet, do not state that they wish to cross-examine him¹⁷ (he is scheduled to testify on 15 September 2016) and admit that it would have been *their* duty to challenge the evidence related to Mr Badreddine, even before his death. Counsel have not provided any submissions addressing the admissibility of Mr Holford's evidence; their request to declare it inadmissible is therefore unsubstantiated.

16. The Head of Defence Office, under the Practice Direction, must inform the Trial Chamber in advance, whenever possible, of making submissions *proprio motu* in the interests of justice.¹⁸ The Trial Chamber has already decided¹⁹ that the Head of Defence Office has no standing to represent or to make submissions in the 'interests' of someone who is neither an accused nor a suspect.²⁰ Mr Badreddine has not been a suspect or an accused before the Special Tribunal since 11 July 2016, and the Defence Office has no standing to represent him or his interests. The observations are therefore inadmissible, and accordingly, the Trial Chamber will not receive them.

¹⁶ Decision Amending the Consolidated Indictment, paras 33-38, in particular para. 37 and para. 63.

¹⁷ Transcript of 5 September 2016, p. 62.

¹⁸ Email to Trial Chamber's Senior Legal Officer at 11.29 on 25 August 2016. STL/PD/2011/04, Practice Direction on the Role of the Head of Defence Office in Proceedings Before the Tribunal, 30 March 2011, para. 8; STL-11-01/T/AC/AR126.10, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0013-AR126.10, Decision on Interlocutory Appeal Against the Trial Chamber's Decision Regarding the Conditions of Assignment of Defence Expert Consultant, 3 May 2016, para. 21.

¹⁹ See, Decision Amending the Consolidated Indictment, paras 24-30.

²⁰ On 11 July 2016 the Appeals Chamber, by majority, determined that sufficient evidence had been presented to convince it that the death of the Accused, Mr Mustafa Amine Badreddine, had been proved on the balance of probabilities. STL-11-01/T/AC/AR126.10, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0019-AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, para. 53. On the same day, the Trial Chamber terminated, without prejudice, the proceedings against Mr Badreddine and ordered the Prosecution to file an amended consolidated indictment; F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.

17. The Head of Defence Office also notified the Trial Chamber that he wished to file a reply to the Prosecution's submissions referred to in paragraph 8 above.²¹ The Trial Chamber does not consider that further submissions on this point are relevant to the determination of this motion. Submissions on such matters should be filed separately.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Defence motions.

Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands
14 September 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



²¹ Email to Trial Chamber's Senior Legal Officer at 12.19 on 9 September 2016, stating that the Head of Defence Office was going to file submissions that afternoon in reply to the Prosecution's response at paras. 23-24. The Trial Chamber then heard from the Parties on whether it should receive the submissions; see provisional transcript of 9 September 2016, pp. 80-83.